Supreme Court, U.S.
FILED
081570 JUN 19 2009
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

Austin Curtis
Petitioner

v.

Janet Napolitano, Secretary,
Department of Homeland Security
Respondent

On Petition For Writ of Certiorari
To the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Brian K. Wiley
Counsel of Record
The Law Office of Brian K. Wiley, Esq. P.C.
100 South Main Street
North Wales PA 19454
(215) 699-2522
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

This case presents one question for review. Whether the Appellate decision below presents a conflict with established United States Supreme Court precedential decisions in Gomez-Perez v. Potter 128 S. Ct. 1931, 170 L.Ed.2d 887 (2008); Sprint United Mgt Co. v. Mendelsohn, 128 S.Ct. 1140 170 L.Ed.2d1 (2008); CBOCS West Inc. v. Humphries, 551 U.S. ____ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008); and Crawford v. Metropolitan Gov't of Nashville, 555 U.S. ___ (2009);

(Suggested Conclusion: Yes)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
TABLE OF APPENDICES.....v
OPINIONS BELOW 1
BASIS FOR JURISDICTION 1
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED.....2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING PETITION.....5

1. Whether the Panel's March 23 2009 Decision is in direct conflict with the United States Supreme Court decision in *Sprint United Mgt Co. v. Mendelsohn*, 128 S.Ct. 1140 170 L.Ed.2d1 (2008).....5
2. Whether the Panel's March 23 2009 Decision is in Direct conflict with the United States Supreme Court decision in *CBOCS West Inc. v. Humphries* 551 U.S.___ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) and also conflicts with *Gomez-Perez v. Potter* 128 S.Ct. 1931 170 L.Ed.2d 887 (2008).....8
3. Whether the Panel's decision also fails to follow the *Gomez* decision which expands

the protection against retaliation for federal employees.....13
CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Ackel v. Nat'l Comm. Inc. 339 F3d 376, 384-515 (5th Cir 2003).....11
Ash v. Tyson Foods, 546 U.S. 454 (2006).....18,19
Anderson v. Liberty Lobby Inc. 47 U.S. 242 (1986).....4,16
Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics 403 U.S. 388, 396 (1971).....2,3,12
CBOCS West Inc. v. Humphries 551 U.S. __ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008).....6,8,9,11,20
Chippolini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3d Cir.1987) (en banc. cert denied 487 U.S. 1052 (1987).....16
Christiansburg Garment Co. vs. EEOC 434 U.S. 412 (1978) 15
Crawford v. Metropolitan Gov't of Nashville, 555 U.S. ___ (2009).....7,14,19,20
Douglas v. V.A. 5 M.S. P. R. 280 (1981).....3

Goodman v. Meade Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 103 (1977).....17
Gomez-Perez v. Potter 128 S.Ct. 1931 170 L.Ed.2d 887 (2008) 8,9,13,14
Harris v. Forklift 510 U.S. 17 (1993).....3
In Re: Unisys Savings Plan Litigation v. Unisys Corp., 74 F.3d 420, 433 (3d Cir. 1996).....16,17
Jackson v. Birmingham Board of Education 544 U.S. 167 (2005).....15
Kodak Co. v. Image Technical Services, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).....15,16,17
Kolstad v. American Dental Assoc. 527 U.S. 526,534-5 (1999) 15
McDonnell Douglas v. Green 411 U.S. 792, 802-804, 93 S.Ct 1817 (1973).....3,7
Mota v. Univ. of Texas 261 F3d 512, 525 (5th Cir 2001) 11
Sprint United Mgt Co. v. Mendelsohn, 128 S.Ct. 1140 170 L.Ed.2d1 (2008) 5,6,7,8,11,20
Sheridan V. E.I. DuPont DeNemours & Co., 110 F.3d 1061, 1072 (3d Cir. 1996).....16
U.S. Postal Service v. Aikens, 460 U.S. at 716, 103 S.Ct at 1482 (1986).....13
Wallace v. Methodist Hospital 271 F3d 212 (5th Cir 2001).....13

STATUTES AND RULES

28 U.S.C. §1254(1).....1,4
42 U.S.C. §1981.....2,13
42 U.S.C. §1983.....2
42 U.S.C. §2000(e).....2,6
Supreme Court Rule 10(a) 4
FRCP 33.....3
FRCP 34.....3
FRCP 56.....3,4,12
EEO Management Directive §717..... .6

TABLE OF APPENDICES

Appendix A-Opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the district court.....1a

Appendix B -Memorandum and Order adopting Report and Recommendation of the United States Magistrate Judge for the Eastern District of Texas (Sherman Division).....3a

Appendix C- Report and Recommendation of the United States Magistrate Judge for the Eastern District of Texas (Sherman Division).....5a

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the district court is reproduced at App. 1a.

The Memorandum and Order adopting Report and Recommendation of the United States Magistrate Judge for the Eastern District of Texas (Sherman Division) is reproduced at App. 3a.

The Report and Recommendation of the United States Magistrate Judge for the Eastern District of Texas (Sherman Division) is reproduced at App. 5a.

BASIS FOR JURISDICTION IN THIS COURT

The basis for this Court's jurisdiction for the Petitioner's Writ of Certiorari is 28 U.S.C. § 1254(1).

The decision of the Appeals Court was issued on March 23, 2009. This petition is filed within 90 days of that date.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics 403 U.S. 388, 396 (1971), this case also involves the First Amendment, the Fifth Amendment, and the Fourteenth Amendment of the Federal Constitution.

STATEMENT OF THE CASE

After many years of administrative procedures, Plaintiff timely filed, in the United States District Court of the Eastern District of Texas, his employment discrimination lawsuit alleging wrongful employment discrimination (discharge); hostile work environment; disparate treatment in the terms and benefits of employment; and unlawful retaliation in violation of federal laws prohibiting discrimination because of plaintiff's race (African-American). Plaintiff specifically raised claims pursuant to Title VII, 42 U.S.C. §2000(e), hereinafter "Title VII", as amended by the 1991 Amended Voting Civil Rights Act 42 U.S.C. §1981.

Plaintiff also raised "*Bivens*" claims (under the Reconstruction Era Civil Rights Acts) for deprivations of federally protected civil rights by defendant acting under color of federal authority and law, analogous to 42 U.S.C. §1983 civil rights claims against non-federal employee Defendants.

Plaintiff raised "§1981" claims alleging intentional race-based discrimination in "enjoyment of all benefits, privileges, terms and conditions" of his federally protected employment with defendant pursuant to 42 U.S.C.A. §1981.

Plaintiff timely raised claims of a racially hostile work environment in violation of McDonnell Douglas v. Green 411 U.S. 792, 802 S.Ct 1817(1973) and Harris v. Forklift 510 U.S. 17 (1993) and of wrongful termination without affording the mandatory "Performance Improvement Plan" available to all federal employees under the Douglas Standards. (Douglas v. V.A. 5 M.S. P. R. 280 (1981))

During the discovery phase of the litigation, plaintiff adduced admissible evidence of intentional discrimination based upon race, and reprisal. Following the completion of discovery, the deadline for filing dispositive motions passed. Thereafter, defendant filed its summary judgment motion, late and without seeking leave of court (as

required by local rules and by the lower court's order.)

Plaintiff timely responded to defendant's untimely motion citing to deposition excerpts of defendant's human resources representatives, witnesses and to the plaintiff himself, pursuant to FRCP 56(b). Plaintiff cited specific responses to FRCP 33 interrogatories and FRCP 34 request for production of documents in opposition to defendant's FRCP 56 motion pursuant to Anderson v. Liberty Lobby Inc. 47 U.S. 242 (1986).

Oral argument was requested by plaintiff, however, the district court magistrate judge recommended the grant of summary judgment based upon the record adduced.

The district court adopted the Magistrate Judge's recommendation without Opinion. Plaintiff timely filed his Notice of Appeal.

On March 23, 2009, the circuit court entered an en banc decision (without opinion) affirming the judgment by the district court's order and memorandum adopting the magistrate judge's report and recommendations. The circuit court's March 23, 2009 decision directly conflicts with U.S. precedents announced by this Court in the cases cited herein infra.

Pursuant to 28 U.S.C. §1254(1), Petitioner now petitions this Honorable Court to grant this Writ of Certiorari.

REASONS FOR GRANTING PETITION

Pursuant to 28 U.S.C. §1254(1), Petitioner's Writ for Certiorari should be granted because the decision from the circuit court affirming the district court's decision of the magistrate judge's recommendation to grant defendant's FRCP 56 motion for summary judgment is in direct conflict with established U.S. Supreme Court precedents from this Court and other cases from the U.S. Fifth Circuit Court of Appeals.

Pursuant to Supreme Rule 10(a) "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort."

1. The Panel's March 23, 2009 decision is on direct conflict with the United States Supreme Court decision in *Sprint United*

Mgt Co. v. Mendelsohn, 128 S.Ct. 1140 170 L.Ed.2d1 (2008)

The Panel's decision that the Petitioner's evidence of both direct and circumstantial evidence failed to satisfy the Title VII burden is in direct conflict with the 2008 United States Supreme Court decision in Sprint. The Panel's decision fails to follow the Sprint decision which expands the types of discrimination to include "other" evidence.

The evidence found deficient by the Panel is the same type and quality of evidence of discrimination the Sprint Court held that Congress intended to root out and eliminate by the passage of the 1991 Amended Civil Rights Act, 42 U.S.C.A. 1981A.

On February 28 2008, a unanimous U. S. Supreme Court held that evidence like the Petitioner's was the type that should not be rejected, as the Panel may have improperly done.

The Panel ignored established U.S. Supreme Court precedent in civil rights discrimination and retaliation cases. The Panel ignored the basic elements of CBOCS West Inc. v. Humphries 551 U.S.___ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008).

The Panel ignored and conflicted with the "direct" evidence standard from McDonnell Douglas v. Green 411 U.S. 792, 802-804, 93 S.Ct 1817 (1973); Crawford v. Metropolitan Gov't of Nashville, 555 U.S. ___ (2009); and Sprint United Mgt Co. v. Mendelsohn, 128 S.Ct. 1140 170 L.Ed.2d1 (2008).

In this case, the evidence regarding the Paton "flyer" which contains racially derogatory terms is obviously admissible as relevant evidence. This evidence also shows defendant's intentional failure to follow mandatory EEO procedures required under Title VII 42 U.S.C. §2000(e) as circumstantial evidence. Therefore, defendant has not sustained his burden of proof to show that the probative value of this evidence is outweighed by undue prejudice.

Further evidence regarding the 2001 "blackface" skit performed at the defendant's FEMA Denton site demonstrates troubling, yet powerful, direct and circumstantial evidence of racially derogatory terms and humiliating treatment of defendant's African-American employees. More direct evidence also included, but is not limited to, defendant's failure to correct, prevent, and/or investigate Racist White Supremacy flyers distributed, and placed

throughout defendant's parking lot on the vehicles of African-American employees, stating the derogatory and racially pejorative words, including "nigger!" To date, the defendant has failed to comply with the Mandatory Management Directives §717 regarding Gary Riddle's racially, outrageous statement, or the racially offensive "nigger" flyers. The Panel has not offered any reason a basis for excluding this obviously relevant evidence.

For this reason the Petitioner respectfully prays this Honorable Court grant this petition on the grounds that the below court's March 23 3009 decision directly conflicts with the decision from the U.S. Supreme Court. Sprint United Mgt Co. v. Mendelsohn, 128 S.Ct. 1140 170 L.Ed.2d1 (2008)

2. The Panel's March 23 2009 Decision is on Direct conflict with the United States Supreme Court decision in *CBOCS West Inc. v. Humphries* 551 U.S. 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) and also conflicts with *Gomez-Perez v. Potter* 128 S.Ct. 1931 170 L.Ed.2d 887 (2008)

The Panel's decision disregard's plaintiff's evidence of both direct and circumstantial evidence in direct conflict with two additional

2008 U.S. Supreme Court decisions in CBOCS West Inc. v. Humphries 551 U.S.___ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) and Gomez-Perez v. Potter 128 S.Ct. 1931 170 L.Ed.2d 887.

The Panel's decision that plaintiff has not sustained his burden directly conflicts with the May 27 2008 U.S. Supreme Court decision in CBOCS West Inc. v. Humphries 551 U.S.___ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008). In CBOCS, the U.S. Supreme Court also reaffirmed the rights of the Petitioner to raise claims of intentional race based discrimination. The evidence that the Panel found insufficient, despite CBOCS was compelling, and deeply troubling for any court to reject. Specifically, plaintiff's CBOCS evidence included evidence of formal complaints by numerous African-American employees alleging serious and troubling racial problems that were allowed to fester at defendant's FEMA's Denton, Texas site.

The U.S. Supreme Court ruled that "other evidence" of discrimination is admissible. CBOCS West Inc. v. Humphries 551 U.S.___ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008). This evidence is relevant as defendant's practices (pre and post-firing of plaintiff) shed light on the fact-finder in terms of whether or not defendant's

proferred explanations were the "true" reasons for defendant's unprecedented treatment of a federal employee.

This evidence of other communications by defendant's employees is relevant to rebut defendant's claim of lack of notice of discrimination at its FEMA Denton site. This admissible evidence is intended, if necessary, to refresh the witness's recollection if defendant's employees including Bobbie Ellis, Kathy Fields, Patricia Courchene, or Phyllis Paton deny a material fact, or otherwise assert "lack of memory" of a fact. The other independent basis for this evidence is statements made by defendant's managers (Paton, Fields, Swann, and Courchene) that can be attributed to the agency as evidence that the proffered explanations for firing plaintiff are false.

The hostile, retaliatory, and demeaning treatment included the defendant's failure to correct, reprimand and/ or discipline a white subordinate, Gary Riddle, who notified the defendant that "*He would never work for a black man!*" After being confronted with this direct evidence of racial bias by Riddle, and in lieu of disciplining Riddle for his unlawful, racially offensive and insensitive declarations, the

defendant actually accommodated Riddle by granting Riddle's request; and stripping the plaintiff of his supervisory duties over Riddle.

Despite these clear, undeniable, and comparative examples of duplicate treatment, including permitting Riddle to resign, despite his poor performance; criminal charges; and direct evidence of racial bias towards plaintiff (and his black coworkers), the Panel chose not to follow clearly established precedents regarding proving discriminatory disparate treatment by defendant.

The Panel's decision further conflicts with other decisions from this Court. See Mota v. Univ. of Texas 261 F3d 512, 525 (5th Cir 2001) (employer's failure to discipline or prevent discrimination is actionable) and Ackel v. Nat'l Comm. Inc. 339 F3d 376, 384-515 (5th Cir 2003). The evidence is apparently found legally deficient despite Sprint, CBOCS, in the material record of both direct evidence of racial discrimination (racist epitaphs, racial threats, written epithets, verbal statements, racially retaliatory statements by comparator Gary Riddle and other white employees) against black employees and the appalling lack of appropriate response by Defendant's Human Resources Department.

The Panel decision also conflicts with precedent clearly established since Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics 403 U.S. 388, 396 (1971). Plaintiff engaged in activity protected by the First Amendment when he reported and protested to defendant (and Defendant's supervisors Paton, Courchene, and Fields) of abuse and waste of taxpayers' resources caused by defendant's discriminatory practices. The Panel knew, or should have known that plaintiff engaged in activity protected by the First, Fifth, and Fourteenth Amendments when plaintiff protested defendant's violations of mandatory directives.[1]

---

[1] At the time of plaintiff's firing, F.E.M.A. Manual Section 2-3(b) stated that "Removal" actions should be preceded by "progressive disciplinary measures". FEMA §3310.1 Disciplinary Procedures requires inter alia, "In those cases where constructive action becomes necessary, the disciplinary measures should have a constructive effect." §2 further requires that all disciplinary actions be timely. §2-3a (3) further requires that "removal is the most severe type of adverse action and the facts and circumstances in a case must support the conclusion that the employee has clearly demonstrated unsuitability." At the time of plaintiff's termination, the plaintiff's "Employee Adverse Action" file revealed that the plaintiff had *no* prior disciplinary actions imposed. On February 25, 2001, Paton signed and approved the merit pay increase for plaintiff specifically finding, "*I*

Hostile environment claims require the employer to take an active and appropriate remedial action once notified of the discrimination claims. Wallace v. Methodist Hospital 271 F3d 212 (5th Cir 2001).

3. The Panel's Decision Also Fails To Follow The *Gomez* Decision Which Expands The Protection Against Retaliation For Federal Employees

In Gomez-Perez v. Potter 128 S.Ct. 1931 170 L.Ed.2d 887 (2008) , another 2008 seminal civil rights pronouncement, the U.S. Supreme Court reminded the lower courts that evidence of racial decimation may be used to support jury verdicts for the rights of our country's federal employees. See U.S. Postal Service v. Aikens, 460 U.S. at 716, 103 S.Ct at 1482 (1986). The plaintiff's evidence in this case too was more than strong.

---

certify the employee's work to be of an acceptable level of competence within the meaning of 5 U.S.C. §5335." The defendant has never fired a similarly situated white Lead Management Specialist for comparable grounds or for pretextual reasons, who also had no prior disciplinary actions.

The lower court ignored the Gomez holding that the evidence petitioner adduced was to be found sufficient and that all appellate courts should follow the Gomez standard.. (Plaintiff verified race discrimination against other African-American employees at Denton site. Plaintiff confirms the "20 niggers in heaven" document with Paton's handwriting - Plaintiff is familiar with Paton's handwriting. Paton continues the hostile environment of retaliation by telling plaintiff's coworkers (Gideon, Bowen, and Miller) that "they don't have to listen to nothing he (the plaintiff) tells you to do". Defendant was aware of other race discrimination claims against Denton site employees Larry Bannister, Larry Springer, Doris Miller, and Gretchen Cain Lamb. Plaintiff has always received superior job performance on all other employment standards.

Even more support for this present petition is established by the Panel's decision which conflicts with the most recent holding from the U.S. Supreme Court in another Title VII retaliation case in Crawford vs. Metropolitan Gov't in Nashville, 555 U.S. ____(Jan 26 2009).

In Crawford, the U.S. Supreme Court spells out the law that the below court disregarded Petitioner's case. In Crawford, the Court reminds

the courts below that they have firmly and finally resolved a long-standing issue regarding the protection of witnesses, who have not filed internal complaints or EEOC charges from retaliation (as Petitioner indisputably has done). This was a major conflict with the 11th Cir. where EEOC sued unsuccessfully a particular company that religiously fired employees who corroborated discrimination and harassment complaints. See Jackson v. Birmingham Board of Education 544 U.S. 167 (2005).

As the U.S. Supreme Court echoed in Christiansburg Garment Co. vs. EEOC 434 U.S. 412 (1978) ..(plaintiffs "chosen instrument of Congress to vindicate policies of the highest priority". See Kolstad v. American Dental Assoc. 527 U.S. 526, 534-5 (1999)

For this reason, Petitioner moves for this instant writ of certiorari as the decision also presents a conflict with sister appellate courts.

The Panel also conflicts with established protocol for FRCP 56 that the standard of the district court is to apply to a motion for summary judgment is one, which requires all disputes as to material facts to be resolved in favor of the non-moving party, herein the plaintiff. See Kodak,

Co. v. Image Technical Services, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

Even where certain facts are undisputed "...summary judgment may not be granted where there is a disagreement over inferences that may be reasonably drawn from those facts." In Re: Unisys Savings Plan Litigation, 74 F.3d 420, 433 (3d Cir. 1996). A jury must be permitted to perform its traditional function in evaluating, through direct observation the testimony of the witnesses to resolve factual disputes. Sheridan v. E.I. DuPont De Nemours & Co., 110 F.3d 1061, 1072 (3d Cir. 1996).

Furthermore, the Panel's decision directly conflicts with the well known axiom that a defendant's motion for summary judgment should be denied.... "If the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 2002 (1986), where a genuine issue of fact exists. The Panel did not apply that the burden of proving there are no issues of material facts remain at all times with the defendant as the moving party. Chippolini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3d Cir.1987) (en banc. cert denied 487 U.S. 1052 (1987). In doing so, the Panel

must examine all evidence in a light most favorable to the non-moving party, here, the plaintiff. Goodman v. Meade Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 103 (1977). If there are any disputes concerning issues of material fact, the non-moving party's version must be presumed correct. Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). Even where certain facts are undisputed "...summary judgment may not be granted where there is a disagreement over inferences that can be reasonably drawn from those facts." In Re: Unisys Savings Plan Litigation, 74 F.3d 420, 433 (3d Cir. 1996).

Despite the fact that the court below recognized and acknowledged these rules, the Panel flatly ignored the teachings of the U. S. Supreme Court by making findings of facts and resolved conflicting evidence in favor of the defendant in too many instances.[2]

---

[2] The plaintiff complained to defendant that the accusations against him were false, malicious, retaliatory and orchestrated by the defendants. Thereafter, Doris Miller and Gretchen Cain heard Phyllis Paton admit, "*she would do everything in her power to get him [the plaintiff] fired!*" Defendant subjeced plaintiff to the aforesaid intolerable and

Following the plaintiff's formal complaints of racial discrimination in June 2000, defendants' disparate and increasingly hostile treatment of plaintiff significantly increased. Plaintiff's specific complaints of race based bias and retaliation, included that the defendant was denying plaintiff the benefit of the same terms and conditions of federal employment as those afforded to similarly situated white coworkers like, Gary Riddle.

The March 23, 2009 Panel decision directly conflicts with Ash v. Tyson Foods, 546 U.S. 454 (2006). In Ash, the Court acknowledged evidence (like Petitioner's) to demonstrate that a term could be racist or evidence of racial animus. In Ash, the term "boy" as directed to two Black men, without requiring that the term be accompanied by a racist or racial qualifier. The Fifth Circuit ignored Ash's teaching that to determine the

---

outrageous working conditions and hostile environment which continued until May 30, 2001 when defendant fired plaintiff. The pretextual reason listed for firing the plaintiff was "using the car" he was assigned and "making cell phone calls" using the telephone assigned to his Supply Section for after hours support. Defendant's employee, Mary Swann, has admitted that no one else has ever been fired by defendant for such a reason.

speaker's meaning; consideration should be given to the tone, inflection, historical usage and context of such terms or code words. This is a standard that could be applied to any discrimination case involving "ambiguous" verbiage, like the Petitioner's case which has terms like, "20,000 dead nigger babies".

In both Crawford and Ash the Court took issue with the legal standard (apparently followed by the en banc panel) that evidence "jumping off the page and slapping you in the face" is an appropriate measure of whether a person's qualifications were superior to the selectee in proving pretext. This insurmountable standard was frequently invoked to deny legitimate selection challenges. This was a significant victory for plaintiffs, like the Petitioner, and should have been followed by the Fifth Circuit here.

CONCLUSION

The Writ is paramount to resolve these apparent conflicts and should be returned to the Appellate Court below to clarify the record and explain why the Panel chose not to follow the U.S.

Supreme Court's express guidance established in the cases cited herein.

Because the March 23, 2009 decision of the court below directly conflicts with established U.S. Supreme Court precedents in Gomez-Perez v. Potter 128 S. Ct. 1931, 170 L.Ed.2d 887 (2008); Sprint United Mgt Co. v. Mendelsohn, 128 S.Ct. 1140 170 L.Ed.2d1 (2008); CBOCS West Inc. v. Humphries, 551 U.S. ____ 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008); and most recently Crawford v. Metropolitan Gov't of Nashville, 555 U.S. ___(2009), Petitioner respectfully prays this Honorable Court grant his Writ of Certiorari and return this case to the Fifth Circuit Court of Appeals for proceedings consistent with this Honorable Court's decision.

Respectfully submitted:

/s/Brian K. Wiley
Brian K. Wiley, Esq.
Counsel for Petitioner

Dated: June 18, 2009

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 23, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-40978

Summary Calendar

Austin L. CURTIS,

Plaintiff-Appellant

v.

Micheal CHERTOFF, Individually and as Secretary, Department of Homeland Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
4:07-CV-307

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

Austin L. Curtis appeals the dismissal of his various employment-discrimination claims on summary

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

judgment. We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Robinson v. Orient Marine Co. Ltd.*, 505 F.3d 364, 365 (5th Cir. 2007). For the reasons set forth by the district court, Curtis failed to meet his responsive burden on summary judgment. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B — MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION DATED AUGUST 20, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CASE NO. 4:07cv307

Austin L. CURTIS,

Plaintiff,

v.

MICHAEL CHERTOFF, SECRETARY
DEPARTMENT OF HOMELAND SECURITY,
IN HIS OFFICIAL CAPACITY ONLY,

Defendant.

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On July 28, 2008, the report of the Magistrate Judge was entered

containing proposed findings of fact and recommendations that Defendant Michael Chertoff's Motion for Summary Judgment (Dkt. 62) be GRANTED and that Plaintiff should take nothing by his claims in this case.

Having received the report of the United States Magistrate Judge, and no objections thereto having been timely filed, this Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the Court. Therefore, Defendant Michael Chertoff's Motion for Summary Judgment (Dkt. 62) is GRANTED and Plaintiff should take nothing by his claims in this case.

All motions by either party not previously ruled on are hereby **DENIED.**

IT IS SO ORDERED.

SIGNED this 20th day of August, 2008.

s/ Michael H. Schneider
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION DATED JULY 25, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CASE NO. 4:07cv307

AUSTIN L. CURTIS,

Plaintiff,

v.

MICHAEL CHERTOFF, SECRETARY
DEPARTMENT OF HOMELAND SECURITY,
IN HIS OFFICIAL CAPACITY ONLY,

Defendant.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Now before the Court is Defendant Michael Chertoff's Motion for Summary Judgment (Dkt.62). The Court finds that it should be GRANTED.

This lawsuit arises out of claims of employment discrimination and retaliation under Title VII, "Bivens," and 42 U.S.C. §§ 1981, 1983, 1985, 1988. Plaintiff Austin

Curtis was an employee of the Federal Emergency Management Agency (FEMA) which is currently a component of the Department of Homeland Security. According to Plaintiff, while he was employed by Defendant as a "Supply Management Specialist (Leader)," he was subjected to racial discrimination, a hostile working environment, and retaliation for his complaints of discrimination. According to Defendant, Plaintiff was never a supervisor while working at FEMA.

In his motion summary judgment, Defendant argues that Plaintiff's non-Title VII claims are barred because Title VII is the exclusive remedy for employment discrimination claims for federal employees. Further, Defendant argues that he is entitled to summary judgment on Plaintiff's Title VII claims because Plaintiff cannot make his prima facie case of discrimination and even if Plaintiff could present a prima facie case of discrimination, Plaintiff was terminated for legitimate nondiscriminatory reasons, causing his claims to fail.

MOTION FOR SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when, viewing the evidence and all justifiable inferences in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Hunt v. Cromartie*, 526 U.S. 541, 549, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). The appropriate inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether

it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). In sustaining this burden, the movant must identify those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party, however, "need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant's burden is only to point out the absence of evidence supporting the nonmoving party's case. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996).

In response, the nonmovant's motion "may not rest upon mere allegations contained in the pleadings, but must set forth and support by summary judgment evidence specific facts showing the existence of a genuine issue for trial." *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Anderson*, 477 U.S. at 255-57, 106 S.Ct. at 2513-14). Once the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record to show that there is a genuine issue for trial.

Stults, 76 F.3d at 655. The citations to evidence must be specific, as the district court is not required to "scour the record" to determine whether the evidence raises a genuine issue of material fact. E.D. TEX. LOCAL R. CV-56(d). Neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the nonmovant's burden. *Stults*, 76 F.3d at 655.

ANALYSIS

"Bivens" and Title 42 U.S.C. §§ 1981, 1983, 1985, 1988 Claims

In this case, Plaintiff purports to assert claims under Bivens v. Six Unknown Named Agents and Title 42 U.S.C. §§ 1981, 1983, 1985, and 1988 alleging the same set of facts that give rise to Plaintiff's Title VII claims. Defendant has argued that these claims cannot survive because Title VII is the exclusive remedy for such allegations and that the Section 1981 claim also fails because there was no employment contract between the parties. Defendant further argues that Plaintiff has no viable "Bivens" claims as there are no Defendants acting in an individual capacity in this suit.

The Court agrees. Title VII of the Civil Rights Act is the exclusive and preemptive remedy for claims of racial discrimination in federal employment. *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir. 1992) (holding that the plaintiff's claims under 42 U.S.C. §§ 1981, 1983, 1985(3) are preempted by Title VII); *see Perez v. F.B.I.*, 71 F.3d 513, 515 (5th Cir. 1995) (holding that the plaintiff

could not prevail on her "Bivens" action because Title VII was her exclusive remedy); see also *Lakoski v. James*, 66 F.3d 751, 755 (5th Cir.1995); Porter v. Adams, 639 F.2d 273, 278 (5th Cir.1981). Further, the Court already denied Plaintiff's request to add individual defendants in an attempt to assert "Bivens" claims (*see* Dkt. 53), and the only defendant here is Defendant Chertoff, who is proceeding in his official capacity only. Because Title VII is the exclusive remedy for the live allegations before the Court, summary judgment in favor of Defendant is appropriate on Plaintiff's "Bivens" and Title 42 U.S.C. §§ 1981, 1983, 1985, 1988 claims.

Title VII Claims

The grant of Defendant's summary judgment as to Plaintiff's "Bivens" and Title 42 U.S.C. §§ 1981, 1983, 1985, and 1988 claims leaves only his Title VII claims to be examined for purposes of this summary judgment motion. Title VII proscribes an employer from discharging or otherwise discriminating against any individual because of that individual's race. 42 U.S.C. § 2000e-2(a)(1). A Title VII inquiry is focused on whether the defendant intentionally discriminated against the plaintiff. *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004). Here, Plaintiff has made claims of race-based discrimination, retaliation and termination under Title VII.

The Fifth Circuit has set forth a specific rubric under which this Court must analyze the summary judgment record in the employment discrimination context.

Appendix C

The modified *McDonnell Douglas* test is used when analyzing claims for race discrimination under Title VII. Under the modified *McDonnell Douglas* approach, a plaintiff must demonstrate a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *Willis v. Coca Cola Enters., Inc.*, 445 F.3d 413, 420 (5th Cir. 2006). In order to establish a prima facie case of race discrimination, a plaintiff must show: (1) he is a member of a protected group; (2) he was qualified for the position; (3) an adverse employment action occurred; and (4) he was replaced by a person not in the protected group. *Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir. 2007) *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Once established, the *prima facie* case raises a presumption of discrimination which the defendant must rebut by articulating legitimate, nondiscriminatory reasons for its actions. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The burden on the employer at this stage is one of production, not persuasion and does not involve any assessment of the employer's credibility. *Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir.2007).

Appendix C

Once the defendant produces evidence of a legitimate, nondiscriminatory reason for the adverse action, "the presumption of discrimination created by the plaintiff's prima facie case disappears and the plaintiff must meet its ultimate burden of persuasion on the issue of intentional discrimination." *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005). Consequently, the burden shifts back to the plaintiff to show that either: (1) the defendant's reason is not true, but is instead designed to serve as pretext for unlawful discrimination; or (2) that the defendant's reason, while true, is not the only reason for its conduct, and another "motivating factor" is the plaintiff's protected characteristic. *Id.* at 351-52; *Rachid*, 376 F.3d at 312 (citation omitted). "[T]he plaintiff must rebut each nondiscriminatory or nonretaliatory reason articulated by the employer." *McCoy v. City of Shreveport*, 492 F.3d 551, 556-57 (5th. Cir. 2007).

Having reviewed the record, the Court finds that Plaintiff has failed to make a prima facie showing of race discrimination. In particular, there is no evidence (or allegation) before the Court that Plaintiff was replaced by a person not in a protected class. Further, as noted above, even if Plaintiff had made a sufficient prima facie showing of discrimination, Defendant here has made a showing of a legitimate, nondiscriminatory reason for Plaintiff's termination. Specifically, Defendant has offered evidence in support of several grounds for Plaintiff's termination, including his failure to properly account for or make proper distribution of government cell phones, unauthorized use of government cell phone

and government car for personal or unauthorized use, and for insubordination for driving a government vehicle without a valid Texas driver's license despite being ordered to get one. In the face of these non-discriminatory reasons (and the evidence supporting them), Plaintiff is required to offer evidence of intentional discrimination to show that the reasons offered by Defendant are merely pretextual.

Plaintiff has not offered any credible evidence of discrimination or pretext. Indeed, Plaintiff has altogether failed to sustain his clear summary judgment burden here. Despite numerous chances to correct the summary judgment record, Plaintiff has failed to comply with this Court's rules and practice regarding proper citation to summary judgment evidence. Plaintiff was directed to comply with the Local Rule requiring him to attach "***excerpted copies*** of pleadings, depositions, answers to interrogatories, admissions, affidavits, and other admissible evidence cited in the motion for summary judgment or the response thereto" (*see* Dkt. 73 citing E.D. TEX. L.R. CV-56(d) (emphasis added)). He did not do so, but rather attached the entirety of the deposition transcripts for this Court's review. Plaintiff also appears to rely on summary judgment evidence which is not attached to his response or otherwise before the Court. For example, Plaintiff has cited to complaints made by him, Lawrence Bannister, Larry Springer, and Doris Miller, his interrogatory responses, "the records of the Branch Chief for FEMA Denton, Texas," and flyers containing racial epithets (*see* Dkt. 77 at 4, 13, 19, and 23) in support of his summary

judgment response. Those documents, however, are not attached to his pleadings or part of the summary judgment record.

Moreover, the majority of Plaintiff's motion is wholly unsupported by any citations to the record. Rather than show how each piece of evidence supports a specific element of one of his claims, Plaintiff, in his late-filed response, has merely inserted a battery of page and line references to deposition testimony—often nonsensical as to their context and failing to specify which piece of evidence he is referring—purporting to support his claims of discrimination (*see* Dkt. 77 at pp. 6-13). In regards to the entire 50-page deposition transcript of Mary Swann, Plaintiff has argued: "The material factual record of Ms. Swann's deposition alone creates a genuine issue of material fact that the human resources explanation for the hostile environment, retaliation, and termination of Plaintiff was not the result of pretextual, after the fact explanation to justify the grave and serious deviations from basic federal personnel procedures under EEO Management Directive 715." (Dkt. 77 at 14). In making this blanket statement, Plaintiff has not cited to a single excerpt from the deposition, nor has he attached a copy of the directive referenced. Arguments like this, without evidentiary support, are completely insufficient to sustain Plaintiff's burden.

And the arguments that are supported by citations to evidence still do not satisfy Plaintiff's McDonnell Douglas burden in showing pretext. Plaintiff has cited

primarily to his own deposition transcript and interrogatory responses (which are-as noted above-not part of the summary judgment record) in support of his claim. A plaintiff's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is generally not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996). Further, Plaintiff's characterization of statements by Swann is not supported by the record or Swann's deposition testimony, and the Court, having made a general review of the entire deposition, finds that testimony does not create any issues of material fact in support of Plaintiff's claims.

In failing to show pretext under McDonnell Douglas, Plaintiff has also failed to provide the Court with any evidence to show that "the adverse employment action . . . would not have occurred but for [the] protected conduct," causing any retaliation claim he has to fail. *Strong v. University HealthCare Sys., LLC*, 482 F.3d 802, 806 (5th Cir.2007). Similarly, Plaintiff has not shown that Defendant gave preferential treatment to another employee with "nearly identical" conduct in order to support his disparate treatment claim, *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 901 (5th Cir.2002), nor has he pointed to any evidence of race-based harassment that affected a term, condition or privilege of his employment at FEMA in support of his hostile work environment claim. *E.E.O.C. v. WC & M Enters., Inc.*, 496 F.3d 393, 399 (5th Cir. 2007); *Harvill v. Westward*

Commc'ns, L.L.C., 433 F.3d 428, 434 (5th Cir. 2005). Therefore, in light of the summary judgment evidence before this Court and having applied the parties' respective burdens, all of Plaintiff's claims under Title VII fail.

The Court notes that this is not the first instance in this case when Plaintiff has failed to comply with the Rules of Civil Procedure or the Local Rules of this Court with respect to this motion for summary judgment and other proceedings before the Court. Plaintiff has even failed to comply with Court requests regarding conducting a settlement conference prior to the Court addressing the merits of Defendant's summary judgment motion. Plaintiff was afforded three opportunities to file his summary judgment response such that it would comply with practice and procedure in this Court, and, in fact, there are at least five docket entries corresponding to Plaintiff's attempts at filing a single response. Simply put, the Court's patience is exhausted.

Although the Court has reviewed what it has before it, the Court will not—and indeed is not required to—scour the record in this matter to determine whether Plaintiff could create a genuine issue of material facts as to each element of his claims. The evidence that the Court has been able to decipher does not create any fact issue, and it declines to spend its time in order to create one. The non-movant's burden in summary judgment proceedings is clear. *See Ragas*, 136 F.3d at 158; *Stults*, 76 F.3d at 655. The Court's time and

resources are limited, and the Court will not do Plaintiff's work for him.

Plaintiff has not sustained his summary judgment burden. Defendant's motion for summary judgment should, therefore, be granted in its entirety and Plaintiff should take nothing by his claims in this case.

Recommendation

Based on the foregoing, the Court recommends that Defendant's Motion for Summary Judgment (Dkt.62) be GRANTED and that Plaintiff take nothing by his claims in this case.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 25th day of July, 2008.

s/ Don D. Bush
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE